APPENDIX A

U.S. COURT OF APPEALS
FOR THE ARMED FORCES.

UNITED STATES,
Appellee,

v.

ADRIENNE M. HALL, Captain Air Force,
Appellant.

No. 96-1240
Crim. App. No. 31483.

Submitted March 5, 1997.
Decided June 9, 1997.

Accused was convicted by general court-martial, Dennis E. Kansala J., of wrongful use of methamphetamines. The United States Air Force Court of Criminal Appeals affirmed. Review was granted. The United States Court of Appeals for the Armed Forces, Cox, C.J., held that challenge to instruction on collateral matter was waived by lack of objection.

Affirmed.

Opinion of the Court

COX, Chief Judge:

Captain Hall was tried by a general court-marial with members at Oflutt Air Force Base, Nebraska. Pursuant to her pleas, she was found guilty of wrongful use of methamphetamines, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. During deliberations on sentence, the military judge, "Should the accused be dismised from the Air Force, what benefits would she be entitled to as a dependent?" Captain Hall is the spouse of a military retiree. The military judge instructed the members as follows:

> The response to that is, her conviction by this court or any sentence imposed by this court, including a dismissal, would not affect any benefits she would be entitled to as a dependent of a retired military person. In other words, those might be use of commissary, use of BX, medical benefits, as any other dependent of a retired military person.

Having given the above instruction, the military judge then asked whether either counsel had "any quarrel with that point of view." Both the prosecution and the defense replied in the negative.

Captain Hall was sentenced to dismissal from the Air Force, without any other punishment. We granted review of the following issue:

> WHETHER THE AIR FORCE COURT ERRED IN IMPLICITLY HOLDING THAT WHERE A MILITARY JUDGE VIOLATES *UNITED STATES V. GRIFFIN*, 25 MJ 423 (CMA 1988) BY ANSWERING A MEMBER'S QUESTION ABOUT COLLATERAL CONSEQUENCES WITHOUT HAVING PROCURED THE ACCUSED'S AGREEMENT TO SUCH A RESPONSE, THERE CAN BE NO PLAIN ERROR IF THE JUDGE'S AN-

SWER WAS ESSENTIALLY CORRECT AND DEFENSE COUNSEL REQUESTED TO INSTRUCTION TO DISREGARD IT; i.e., WHETHER *GRIFFIN* MEANS WHAT IT SAYS, THAT A MILITARY JUDGE MAY ONLY ANSWER MEMBERS' QUESTIONS REGARDING COLLATERAL CONSEQUENCES "IF AN ACCUSED AGREES."

[1] This Court has repeatedly held that collateral consequenes of a court-martial conviction should not be the concern of the court-martial and that instructions thereon should be avoided. *United States v. McElroy*, 40 MJ 368, 371-72 (CMA 1994); *United States v. Griffin*, 25 MJ 423 (CMA 1988). We agree with Chief Judge Everett's observation in his separate opinion in *Griffiin* that "the collateral consequences of a sentence—or even of a conviction—cannot always be foreseen." 25 MJ at 425. "On the other hand, it is . . . not error" for a military judge "to answer the members' questions *if an accused agrees.*" 25 MJ at 424. It is equally clear that these collateral consequences continue to be a concern to members of a court-martial, for numerous reasons. As this Court observed in *Griffin:*

> First, in reality, the impact of an adjudged punishment on the benefits due an accused who is eligible to retire is often the single most important sentencing matter to that accused and the sentencing authority. Thus, it is only in a theoretical sense that the effect a punitive discharge has on retirement benefits can be labeled collateral. Moreover, the impact on benefits —whatever it may be—can only be a direct and proximate consequence of the sentence.

25 MJ at 424.

[2] Captain Hall was tried on August 18, 1994. She made an unsworn statement to the members that she had

prior enlisted service, had obtained a commission through ROTC, had married an individual who was then retired from the Air Force, and was eligible to retire from the Air Force on December 4, 1994. She asked the court members to impose punishment only on herself and not on her family. The military judge, without objection, instructed the members that a dismissal could deprive appellant "of substantially all benefits administered by the Veterans Administration and the Air Force establishment."

We have recently addressed the issue of instructing on retirement benefits in *United States v. Sumrall*, 45 MJ 207 (1996); *see United States v. Graves*, 46 MJ 133 (1997). It is clear that members of courts-martial, military judges, and the parties do not consider loss of these benefits to be collateral or immaterial. However, we need not address this issue, because we conclude that objections to the military judge's instruction were waived by failure of appellant to object or seek a curative instruction. *See McElroy, supra* at 372 (waiver by failure to object); *United States v. Griffin, supra*. The sentence will be set aside only if the instruction by the military judge constituted plain error.

[3-5] Plain error is a doctrine that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Strachan*, 35 MJ 362, 364 (CMA 1992), quoting *United States v. Fisher*, 21 MJ 327, 328-29 (CMA 1986), *quoting United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct 1584, 1592 n. 14, 71 L.Ed.2d 816 (1982). "To establish plain error, appellant must demonstrate: that there was 'error'; that such error was 'plain, clear, or obvious'; and that the error 'affect[ed]' appellant's 'substantial rights.' " *United States v. Czekala*, 42 MJ 168, 170 (1995), quoting *United States v. Olano*, 507 U.S. 725, 732, 734, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). Appellant has failed to satisfy her burden of showing that an obvious, substantial error occurred and

that the error had an unfairly prejudicial impact on her case. *United States v. Strachan, supra.*

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judges SULLIVAN, CRAWFORD, GIERKE, and EFFRON concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

ACM 31483

UNITED STATES

v.

CAPTAIN ADRIENNE M. HALL, 572-98-0554FV
United States Air Force

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17 June 1996

Sentence adjudged 18 August 1994 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Dennis E. Kansala.

Approved sentence: Dismissal.

Appellate Counsel for Appellant: Captain Todi S. Garnes (argued), Colonel Jay L. Cohen, and Freddy B. Ruiz.

Appellate Counsel for the United States: Captain Libby A. Brown (argued), Colonel Jeffrey T. Infelise, and Lieutenant Colonel Michael J. Breslin.

Before

HEIMBURG, GAMOA, and SENANDER
Appellate Military Judges

OPINION OF THE COURT

SENANDER, Judge:

The appellant was convicted, by a general court-martial, in accordance with her pleas of wrongful use of methamphetamine. Article 112a, UCMJ, 10 U.S.C. § 912a (1994). Her approved sentence is a dismissal. Appellant asserts two errors by the military judge: his incorrect ruling that admission of certain defense exhibits would permit the government to offer appellant's confession; and his failure to give proper instructions. The appellant also alleges that she received ineffective assistance from her trial defense counsel, and that the sentence was inappropriately severe. We find none of her arguments persuasive and affirm.

The appellant was randomly selected on February 8, 1994, for urinalysis testing. Her sample tested positive for the methamphetamine metabolite. When questioned by agents of the Air Force Office of Special Investigations, she confessed to use of methamphetamine during January 1994. She additionally told agents she used methamphetamine during 1988 and 1989, another stressful period in her life.

I. EXCLUSION OF REBUTTAL EVIDENCE

Trial defense counsel made a motion *in limine* to exclude the use by trial counsel of that portion of the appellant's confession which related to the uncharged misconduct in 1988 and 1989 and the two purchases of amphetamines. The motion was made to preclude trial counsel from using these statements from appellant's confession in rebuttal to certain character letters which the de-

fense intended to introduce. The appellant asserts that the character letters in question were substitutes for an Officer Performance Report for the period May 16, 1993 to August 18, 1994, and that no rebuttal should have been permitted, since trial counsel was required to present evidence of duty performance. R.C.M. 1001(a)(1)(A)(ii).

During an Article 39(a), 10 U.S.C. § 839(a) (1994), session the military judge stated that he believed the letters in question contained statements that would make them character letters rather than merely statements of duty performance from May 16, 1993 to August 18, 1994. The military judge specifically found the character letters would open the door to rebuttal by evidence of prior uncharged drug use because the letters portrayed the appellant as a good military officer and a professional, and reflected numerous qualities of leadership.

The military judge gave the trial defense counsel the opportunity to redact those portions of the statements which covered the appellant's entire career rather than the period May 16, 1993 to August 18, 1994. If the trial defense counsel had redacted the statements as suggested, it appears likely that the military judge would not have permitted appellant's confession to methamphetamine use in 1988 and 1989 to be used as rebuttal. However, the appellant did not offer the character letters in any form. Therefore, there was no evidence for the trial counsel to attempt to rebut. Trial defense counsel basically requested the military judge to give an advisory opinion, and when his preliminary opinion was not favorable, the defense counsel decided not to offer the character letters. Failure to offer the exhibits waived any issue. *See United States v. Gee*, 39 M.J. 311 (C.M.A. 1993) (Failure to call character witnesses barred review of denial of defense motion *in limine* to prevent cross examination of character witnesses on their knowledge of appellant's drug use). This assignment of error is rejected.

II. IMPROPER SENTENCING INSTRUCTIONS

During sentence deliberations the President of the court-martial panel asked the following question: "Should the accused be dismissed from the Air Force, what benefits would she be entitled to as a dependent. That being because her husband is a retired member of the Air Force." The military judge responded: "Her conviction by this court, including a dismissal, would not affect any benefits she would be entitled to as a dependent of a retired military person. In other words, those might be use of commissary, use of BX, medical benefits, as any other dependent of a retired military person. Does that answer the question?" The military judge then asked: "Does counsel for either side have any quarrel with that point of view?" Both counsel answered in the negative.

Appellant asserts for the first time on appeal that the military judge committed plain error by answering the President's question. The standard of review for sentencing instructions is whether the military judge abused his discretion in giving or failing to give an instruction. *United States v. Dubose*, 19 M.J. 877 (A.F.C.M.R. 1985), *pet. denied*, 21 M.J. 147 (C.M.A. 1985). Absent a timely objection, an error in sentencing instructions is waived unless such error rises to the level of "plain error." *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988), *cert. denied*, 487 U.S. 1206, 108 S.Ct. 2849 (1988). In order to constitute plain error, appellant must show that an obvious, substantial error occurred and that the error had an unfairly prejudicial impact on his case. *United States v. Strachan*, 35 M.J. 362, 364 (C.M.A. 1992), *cert. denied*, 507 U.S. 990, 113 S.Ct. 1595 (1993).

Ordinarily, the appropriate reply for a military judge faced with such a question is to simply to affirm that "collateral consequences are not germane" to the sentencing process. *Griffin*, 25 M.J. at 424. The trial defense counsel waived any objection, however, by indicating he had

no quarrel with the military judge's answer. We find no plain error: the military judge's answer was essentially correct, and trial defense counsel did not request further instructions. To establish plain error, the appellant must also establish the error had an unfair impact on the courts members' deliberations. *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986). We find there is no reasonable probability that the members would not have adjudged a dismissal. Illegal drug use has long been considered a serious offense and particularly perilous for officers, who are expected to set the standards for others to follow. *United States v. Holt*, 28 M.J. 835 (A.F.C.M.R. 1989), *pet. denied*, 28 M.J. 434 (C.M.A. 1989). This assignment of error is without merit.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant asserts that her trial defense counsel were ineffective by failing to investigate appellant's mental and medical history. Appellant argues that her husband had informed trial defense counsel that appellant should be evaluated by a psychiatrist due to emotional and physical problems of which they were not aware. Specifically, appellant was diagnosed after trial as having a sleep disorder. She now contends that the use of amphetamines was necessitated by her inability to sleep at night and the need to be alert to function during duty hours. Appellant believes if the court members had been made aware of her sleep disorder they would not have imposed a dismissal.

Trial defense counsel responded to the allegation by affidavit in which he described a comment by appellant's husband that "there was a history there that we [defense counsel] were not aware of." The husband would not elaborate when asked what he meant and the appellant sat silent. Trial defense counsel affirmed the defense strategy, approved by appellant, was to ensure that the members saw her usage as a one-time foolish response to

a stressful situation. This was a sound strategy and, in our opinion, was superior to appellate defense counsel's argument, that appellant's long time use of methamphetamine resulted from a sleep disorder.

The standard for measuring a claim of ineffective assistance of counsel is set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See also United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). Appellant must show counsel's performance was deficient and also show resulting prejudice. We find no evidence that trial defense counsel's performance was deficient. Trial defense counsel's strategy was reasonable and therefore does not support appellant's claim of ineffectiveness of counsel. *United States v. Mansfield*, 24 M.J. 611, 617 (A.F.C.M.R. 1987). Tactical decisions will not be second-guessed. *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 600 (1993). We reject this assignment of error.

IV. SENTENCE APPROPRIATENESS

Appellant argues that her sentence is in excess of what is appropriate in this case given her superior duty performance, her sleep disorder and methamphetamine addiction. Under Article 66(c), UCMJ, our statutory mandate is to determine sentence appropriateness to ensure that justice is done. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). A higher standard of conduct may be required of officers because of their special status. *United States v. Tedder*, 24 M.J. 176, 182 (C.M.A. 1987). The Court of Military Appeals has endorsed subjecting officers to more stringent punishments for their violations of the UCMJ than might be appropriate for an enlisted member under the same circumstances. *United States v. Moultak*, 24 M.J. 316, 318 (C.M.A. 1987). We find no merit in this assignment of error. We conclude that the findings and the sentence are correct in law and fact, the sentence is not inappropriate, and no error prejudicial to the substantial rights of the appellant was committed.

Accordingly, the findings of guilty and the sentence are correct in law and fact and are

AFFIRMED.

Senior Judge HEIMBURG and Judge GAMBOA concur.

[SEAL]

OFFICIAL

/s/ Alvin J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

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